No. 22,654

United States Court of Appeals

For the Ninth Circuit

DON W. MCNAMARA and
GENEVIEVE C. MCNAMARA,
Appellants,

vs.

JONES & GUERRERO CO., INC.,
Appellee.

Upon Appeal from the District Court of Guam

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

Jurisdiction of this appeal is in the United States Court of Appeals for the Ninth Circuit pursuant to the provisions of Section 1424, Title 48, USCA and Sections 1291 and 1294, Title 28, USCA, both as amended.

STATEMENT OF FACTS

On or about October 18, 1966 the appellants and appellee entered into an employment contract whereby the appellee agreed to employ the appellants on the island of Guam. (See Exhibits A and B contained in the transcript of record, said exhibits being the employment contracts). The appellants arrived on Guam and their employment began November 1, 1966.

On January 26, 1967 the appellants directed a letter to Robert Jones, General Manager for the appellee, as follows:

> "Dear Mr. Jones:
>
> Please accept this letter as our official resignation from Jones and Guerrero Enterprises, Red Carpet Steak House and Cliff Motel.
>
> We feel our salaries can be eliminated as the first step to efficiency as it is an unnecessary expenditure. With your supervision and efficient hostesses, there is no need for this expense.
>
> We sincerely regret this decision, which has not been a hasty one and dislike walking away from a job that has not been completed. We have never done this before but see no alternative in this instance.
>
> We would like to be relieved of our duties at the earliest possible moment.
>
> Regretfully,
> Don W. McNamara
> Genevieve C. McNamara"

(See Exhibit C, Transcript of Record.)

Thereafter the appellee filed an action attempting to recover the total sum of $650.29, said money being the amount spent for air transportation from San Francisco to Guam. The contract of employment provides that if the employee vacates the position without the consent of the employer prior to the expiration of 12 months, he is responsible to the employer for that money expended by employer for his transportation to Guam.

Thereafter the appellants filed an answer and counter-claim. A motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure was made by the appellee and granted by Judge Shriver of the District Court of Guam, from which judgment the appellants appealed.

ARGUMENT

I. GENERAL.

From the appellants' brief, it is apparent that they do not argue that the appellee failed to prove its cause of action sufficient for purposes of Summary Judgment, but rather rely in this appeal on the fact that their affidavits show a breach of contract by appellee thereby justifying the abandonment or attempted rescission of the contract by the appellants as indicated by their letter of January 26, 1967 quoted above. It is just as apparent that they do not argue the effect of that letter; therefore, the issue seems to resolve itself down to whether the affidavit of the appellants was sufficient to raise such issue of fact as to preclude issuance of a Summary Judgment.

II. THE LAW IS WELL SETTLED AS TO THE GENERAL APPLICABILITY OF THE SUMMARY JUDGMENT PROCEDURES.

The appellee cannot and does not argue with the statement of the appellants that summary judgment is authorized only where after looking at the record

in a light most favorable to the opposing parties, it is quite clear what the truth is and there is no genuine issue remaining for trial. In fact, Judge Shriver in his decision stated:

> "The Court is conscious of the fact that a motion for a summary judgment should never be granted if there is a question of material fact which remains to be determined. . . . Any allegations made must be construed most favorably to the defendants when we are dealing with a motion of this kind".

(See pages 1 and 2 of the Transcript of the hearing on the Motion contained in the Transcript of Record.)

However, the Judge, even after construing these allegations most favorably to the appellants, stated:

> "I can see no question of material fact in this case. I can see no basis whatever under which the allegations of the defendants in this case could reach a jury".

It is equally well settled that on a motion for summary judgment the Court has discretion to disregard those facts that would not be admissible in evidence and to rely on those facts which are competent evidence. *Wimberly v. Clark Controller Co.,* 1966, 364 F. 2d 225. Further that not every issue of fact, however genuine precludes entry of summary judgment and it is only genuine issues of material fact which have that effect. *U. S. v. Device Labeled Cameron Spitler Ambloy-Syntonizer,* 1966, 261 F. Supp. 243, and a genuine issue of fact has been defined as one which can be supported by substantial competent evidence. *Taylor v. Rederi,* 1966, 249 F. Supp. 326. There-

fore, the issue in this case is whether the appellants' affidavit provides a genuine issue of material fact supported by substantial evidence so as to preclude the issuance of a summary judgment.

III. THERE WAS NO ISSUE OF MATERIAL FACT SUPPORTED BY SUBSTANTIAL EVIDENCE SO AS TO PRECLUDE THE ISSUANCE OF A SUMMARY JUDGMENT.

a. The so-called parole evidence rule rendered inadmissible much of the evidence which the appellants purported to introduce in their affidavit.

It is again well settled that a parole condition may not be shown if it is contrary to the terms of the written contract. Fraud in the inducement by a promise made without the intention of performance may be shown by parole if the promise refers to an act not covered by the terms of the contract, but not if it is directly at variance with the terms of the evidence. (See generally *Simmons v. California Institute of Technology,* 1950, 34 C. 2d 264.)

The issues presented by the affidavit are as follows:

1. Extent of the work week in hours.
2. Extent of the work week in days.
3. Duties of the appellants.
4. That the restaurant would be operable 18 October 1966.
5. The furnishing of meals without cost.
6. The furnishing of adequate housing.
7. The furnishing of an automobile at cost to the appellants.

The contract with regard to those issues provided as follows:

> 1. That housing, including utilities and major furniture would be furnished by the employer at the site of the work; however, the rental and ultility costs should not exceed $125.00 per month. Any excess cost over the $125.00 limit would be borne by the employee; conversely, should the housing and utility cost be less, then the difference would be paid to the employee. The employee was free not to live in the company housing area and in that case the full $125.00 per month would be paid to the employee.
>
> 2. That the employee agreed to work a *minimum* of 48 hours per week.

Aside from the bare allegation that the appellee sold to appellants an automobile considerably above cost, there is no other evidence regarding this particular item and a mere statement of conclusions does not raise the required issue of fact. (See *Taylor v. Rederi,* supra.)

With regard to the general duties of the appellants, the alleged breach of which was relied on heavily in the affidavit, tthe contract provides:

> "I. Assignment of work.
>
> 1. The employee shall be employed by the employer in the classification above specified, the employee expressly representing to the employer that he is fully qualified to perform said class of work. Said employment shall be in connection with any work of the employer on Guam.

2. *The employer may require the employee to render service in a classification of labor other than that mentioned above provided that the employee's salary shall not be reduced.*" (Emphasis supplied.)

With the exception, therefore, of the issue of furnishing of meals and the opening date of the restaurant, the alleged misrepresentations are all in direct conflict with the terms and conditions of the contract and therefore evidence regarding such misrepresentations would not be admissible and the Judge in his discretion was entitled to disregard those parts of the affidavit.

This is especially so in light of the paragraph contained in the contract immediately above the appellants' signatures indicating that the employee had read the agreement, fully understood its terms, certified that the terms and conditions constituted his entire agreement with the employer, that no promises or understandings or representations were made other than those stated in the agreement and that modification of the agreement might only be made by a written instrument signed by both the employee and employer.

b. Whatever issues sustained by admissible evidence remaining in the affidavit were as a matter of law either not sufficient to justify the breach of contract by the appellants or were, in fact, waived by appellants.

The case of *Pasquel v. Owen,* 1950, 186 F. 2d 263, provides an excellent discussion of the question of sufficiency of non-performance to justify a subsequent breach and waiver of non-performance.

This case involved a contract to employ the appellant as a baseball player-manager.

Mr. Pasquel was removed as manager and continued playing baseball as a player for a period of time and then left the job in Mexico and returned to the United States. The Court made the determination that the promisor's lack of full performance did not justify the subsequent breach by Pasquel and further, that Pasquel had waived whatever rights he had to rescind the contract. The Court stated on page 269 of the decision:

> "The contract here is specific in the matter of compensation. As has already been observed, it is not specific as to the obligations of the parties with reference to the defendant's duties . . . insofar as plaintiff was concerned, there was at most only a partial breach of the contract as he at no time failed to pay the full consideration agreed upon and following the alleged breach, the defendant made no demand of performance upon him, but so far as the plaintiff knew, defendant accepted plaintiff's performance of the contract".

The *Pasquel* case, supra, is in line with the instant case in that the above quoted portions of the contract between the appellant and appellee indicate that the contract was not specific with reference to the appellant's duties; further, as in the *Pasquel* case, supra, the appellee never failed to pay the full consideration agreed upon and also following the alleged breach of contract the appellants made no demand of performance upon the appellee and insofar as appellee knew, the appellants accepted their perform-

ance of the contract. It is especially significant that no demand was made upon the appellee in that the contract provides that the employee agrees that if he has any claim arising out of, or in connection with, the employment, he will give written notice to the employer of such claim and that he will not institute any suit or action against employer prior to three months after filing a written notice of the claim.

The *Pasquel* case, supra, quoted *Pickens County v. National Surety Co.,* 4 Cir; 13 F. 2d 758, 761:

> "'To permit abandonment, it is necessary that the failure of the performance go to the substance of the contract. 13 C.J. 657.
>
> Before partial failure of performance of one party will excuse the other from performing his contract, or give him right of rescission, the act failed to be performed must go to the root of the contract. 6 R.C.L. 1014; *Chamberlain v. Booth & McLeroy,* 135 Ga. 719, 70 S.E. 569, 35 L.R.A.; N.S. 1223'".

The *Pasquel* case, supra, went on to state:

> "Ordinarily strict compliance with every specification of a contract is not of its essence unless made so by the terms of the contract itself or by necessary implication, and where one party has received and retained the benefit of substantial payments by the other party, he cannot retain the benefit and repudiate the contract, but in order to warrant an abandonment, the partial failure to perform must go to the very root of the contract. *Tichnor Bros. v. Evans,* 92 V.T. 278, 102A. 1031, L.R.A. 1918 C, 1025".

The *Pasquel* case, supra, stated that the employer's lack of full performance was not sufficient to justify the abandonment of the contract by the employee. The Court further ruled against the employee on the grounds of *waiver* as they stated:

> "Certainly strict and full performance of a contract may be waived by either of the parties and where one party entitled to strict performance waives such performance, there can be no damages for the failure to perform strictly, neither can there be a right in the party so waiving strict performance to abandon the contract. It is said that any act indicating an intention to continue under the contract will operate as a conclusive election. (Citations.) Here after the alleged breach, defendant not only continued under the contract, but plaintiff paid compensation due under the contract. This action showing that the contract was deemed to be a subsisting agreement after the alleged default. (Citations.)"

See also re waiver: *Knutson v. Slab Form Co.,* 1942, 128 F. 2d 408. Rehearing denied 130 F. 2d 200 and *Jauch v. Powertown Tire Corp.,* 1925, 209 N.Y.S. 16, citing *Littlejohn v. Shaw,* 159 N.Y. 188, 53 N.E. 810, which stated:

> "It is a general principle that where a party to a contract refuses to fulfill and bases the refusal upon a particular ground, clearly and deliberately stated, all other objections are deemed waived".

There is no indication in the appellants' affidavit in the instant case that they complained to the appellee of the alleged non-performance; there is no

argument but that the appellee continued to make the payments to the appellants as required by the contract and that the appellants continued to work. The letter of January 26, 1967 sent to the appellee by the appellants clearly indicates that they were not leaving because of the later alleged breach, but rather that they were leaving of their own free will. This is further substantiated when the complaint of the appellee and the answer of the appellants are read together. The complaint indicated that the defendants-appellants agreed to reimburse plaintiff-appellee said balance of money expended for transportation, but defendants did not pay as agreed. The appellants' answer referred to that agreement to pay stated:

> "On or about 27 January, 1967 and after the making of the agreement set forth in the amended complaint, but before any breach by defendants thereof, it was mutually agreed by plaintiff and defendants that said agreement should be rescinded."

It is apparent therefore that after the appellants sent their letter to the appellee, they agreed to make the payments to reimburse the appellee for their transportation costs, but later decided to rescind even that agreement. To enter into an agreement such as this after the appellants terminated their employment leads to no other conclusion but that the appellants decided to leave on their own accord and not because of any breach by the appellee.

CONCLUSION

It is submitted that whatever genuine admissible issues of fact were raised by the appellants' affidavit, they were not sufficient to justify the breach by the appellants and furthermore, that the appellants by their failure to object waived their right to rely upon such non-performance; further, that by their letter of January 26, 1967 waived their right to rely on such evidence and it is respectfully submitted that the summary judgment issued in this case be affirmed.

Dated, Walnut Creek, California,
November 22, 1968.

Respectfully submitted,
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ARRIOLA, BOHN & DIERKING,
Attorneys for Appellee.